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IN THE

Supreme Court of the United States

October Term, 1992

THOMAS G. CARPENTER, *Petitioner,*

vs.

UNIVERSAL STAR SHIPPING, S.A.; and
SEALASKA TIMBER CORPORATION, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT UNIVERSAL STAR SHIPPING'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ADDITIONAL STATUTE

Section 902(21) of the Longshore and Harbor Workers' Compensation Act reads as follows:

> When used in this chapter--
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> **(21)** Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter [sic] or bare boat charterer, master, officer, or crew member.

STATEMENT OF THE CASE

The District Court decided this case on motion for summary judgment. Petitioner does not assert here, nor did he assert below, that any genuine issue of material fact was decided in violation of summary judgment procedure. The questions presented here do not contend that the factual premises of the decisions below are flawed for any other reason. Accordingly, the facts relevant to the legal questions presented here are those accepted as uncontested by the District Court and Court of Appeals.

Petitioner cites, characterizes and argues evidence in detail that is not relevant here given that the facts are established, so it is unnecessary to discuss the extent to which that evidence may be mischaracterized, out of context, or incompetent. But respondent Universal Star Shipping[1] does note and in general concurs with Sealaska's remarks concerning petitioner's treatment of the evidence.

The settled facts upon which this case depends are these. The injury that gave rise to this action occurred on June 15, 1986 when petitioner, who was working as a

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[1] Universal Star Shipping has no parent, subsidiary or affiliate.

longshoreman, slipped and fell into a gap between a stowed cargo of logs and the hull of the ship PACIFIC VICTORY. The PACIFIC VICTORY was owned and operated by Universal, was time-chartered to Daiichi Chuo Kisen Kaisha, and was in turn voyage-chartered to respondent Sealaska Timber Corporation. Sealaska had hired petitioner's employer, West Coast Stevedoring, to load the cargo of logs onto the PACIFIC VICTORY.[2]

Clause 62 of the time charter provided that "Stevedores, when required, shall be employed and paid for by charterers, but this shall not relieve owners from responsibility at all times for proper stowage, which must be controlled by the master, who shall keep a strict account of all cargo loaded and discharged." Clause 5 of the voyage charter provided that "Charterer is to load, stow, lash, secure, trim and discharge the cargo free of risks and expenses to owners."[3]

West Coast Stevedoring directed the placement of the logs. The ship's crew observed the loading of the PACIFIC VICTORY primarily to ensure that the logs

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[2] Pet. A-5, A-6, B-2.

[3] Pet. A-16.

were loaded onto the vessel correctly. If the logs were to shift during the journey, they could upset the vessel's trim. But Universal's control was limited to situations where an improper log stow would adversely affect the trim of the vessel as it went through various stages of loading, transporting and discharging the cargo.[4]

Sealaska also was represented on site, by Mr. Michael York. As the voyage charterer, Sealaska performed several different tasks. First, it hired subcontractors to sort and bundle the logs according to size and length. Sealaska also provided the stevedore, West Coast, with a "lineup," which prescribed the order in which the logs were to be loaded. In addition, Sealaska acted as a general coordinator between the various subcontractors who were involved in the overall loading of the PACIFIC VICTORY. Mr. York's duties included the supervision and inspection of cargo loading, the preparation of the log loading plan, and the assignment of logs to appropriate holds.[5]

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[4] Pet. A-5; Pet. B-3; Pet. C-6.

[5] Pet. A-5, A-6.

As further recited by the Court of Appeals, prior to petitioner's accident, several comments had been made about the stow to West Coast and to Sealaska, through Mr. York, by various members of the PACIFIC VICTORY's crew. Mr. Erada, the ship's chief officer, noticed some "broken spaces in the stow," referring to holes between the piles of loaded logs, after the first day's loading. On the second day of the loading, Mr. Erada informed the captain of the ship of these broken spaces. Mr. Erada was concerned about the safety of the stevedores and that the full booking of the ship would not be loaded because of the broken spaces. The captain told Mr. Erada to inform Mr. York of the broken spaces, which he did. Mr. Erada also informed West Coast's general supervisor about the danger the broken spaces represented. Later on the second day of loading, Mr. Erada and the captain again spoke with Mr. York about the broken spaces. On the morning of June 15, the day of Carpenter's accident, Mr. Erada once again warned Mr. York of the danger. At that time, Mr. York promised

to tell his superintendent and the walking bosses about the broken spaces.[6]

Later that day, while the longshoring crew was attempting to maneuver a bundle of logs into place, Carpenter slipped and fell into a thirty-foot hole. The hole in the stow was unrelated to any equipment of the ship. There was no suggestion by petitioner that the design of the vessel or its structural peculiarities contributed to the dangerous condition. There was no indication that Universal created the gap, and no support for a finding that Sealaska created it by actively directing the log stow. Neither Universal nor Sealaska acted to assume a duty to intervene.[7]

PETITIONER'S REASONS FOR GRANTING CERTIORARI ARE INADEQUATE

A. The Ninth Circuit's Decision in This Case Does Not Conflict With Those of Other Circuits.

Petitioner's claims arise under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. Under the Act, the primary source of relief for

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[6] Pet. A-6.

[7] Pet. A-6, A-7, A-14; Pet. B-5, B-6; Pet. C-6.

injured longshoremen is their right to limited statutory benefits from their employer, regardless of fault. Longshoremen also have a right to sue a class of third parties, "vessels," for negligence. See 33 U.S.C. §§ 905, 933; Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 268-71 (1979). As vessel owner/operator and charterer, Sealaska and Universal are both within that class. 33 U.S.C. § 902(21).

Carpenter claimed that Sealaska and Universal negligently failed to meet their duty to intervene with his stevedore employer to protect him from hazards, such as the gap, resulting from improper stowage by the stevedore.[8] Petitioner asserted that a duty to intervene existed under Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981).

The decision the Ninth Circuit reached on this contention by petitioner was that where the improper loading that caused the hazard is performed by the injured longshoreman's employer, and no defective ship's gear is involved in the case, no duty to intervene arose.[9] As one

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[8] Pet. A-9, A-14.

[9] Pet. A-11, A-12, A-14, A-15.

of his two reasons for granting the writ, petitioner contends that the Ninth Circuit's decision is in irreconcilable conflict with Fifth, Second and Fourth Circuit cases. Petitioner is wrong.

No Fifth Circuit decision conflicts. Petitioner cites no Fifth Circuit decision finding a duty to intervene where the injured longshoremen's employer has created a cargo hazard during loading, and no defective ship's gear is involved in the case. Futo v. Lykes Brothers Steamship Co., Inc., 742 F.2d 209 (5th Cir. 1984). The leading Fifth Circuit case on the duty to intervene respecting stevedore-created hazards is Futo, etc., which held that no duty to intervene arose with respect to a hazard presented to longshoremen by shipboard scaffolding furnished and erected by their employer. Id. at 214-218. Though "reluctant to adopt any across-the-board rule that the involvement of a dangerous condition of the ship itself, its gear or equipment, is in all circumstances per se either necessary or sufficient to impose a duty on a shipowner having knowledge of the situation," the court held that "something more is required than the mere shipboard location of the dangerous situation and the shipowner's knowledge of it." Id. at 215 (emphasis in original).

Declining to attempt to list every possible "something more" that might be sufficient to impose a duty on the vessel, the court noted that "[i]t may well be that as a practical matter the determinative factor will generally turn out to be whether or not a dangerous or defective condition of the ship itself, its gear, or equipment is involved." Id. n.10.

Casaceli v. Martech International, Inc. summarized considerations pertaining to the existence of a duty to intervene identified by Futo:

> Whether the danger was open and obvious; whether the danger was located with the ship or ship's gear; which party created the danger or used the defective item and was therefore in a better position to correct it; which party owned and controlled the defective item; whether an affirmative act of negligence or acquiescence in the use of the dangerous item occurred; and whether the shipowner assumed any duty with regard to the dangerous item.

774 F.2d 1322, 1328 (5th Cir. 1985), cert. denied, 475 U.S. 1108 (1986). In Casaceli, the duty to intervene claim of

the decedent longshoreman's representative was rejected primarily because the defect that allegedly caused the longshoreman's death was not a part of the ship or the ship's normal gear. Id. at 1331. Application of the Futo/Casaceli factors would not have yielded a different result in petitioner's case.

Finally, applying the Futo/Casaceli factors, Hunter v. Navrom, 868 F.2d 1386, 1387 (5th Cir. 1989), rejected the duty to intervene claim of a longshoreman injured during cargo loading operations notwithstanding the court's assumptions that the stevedore's loading operation was dangerous, that the vessel owner had actual and complete knowledge of the danger, and that the longshoreman could not avoid the danger. The court found

> that the dangerous condition had nothing to do with the vessel's gear; that the vessel did not own the defective item; that there was no allegation of an affirmative act of negligence by the vessel; and that the shipowner had not assumed any duty with regard to the dangerous condition.

Id. at 1388.

The holding of Woods v. Sammisa Company, Ltd., 873 F.2d 842 (5th Cir. 1989), cert. denied sub nom. Sammiline Company, Ltd. v. Woods, 493 U.S. 1050 (1990), does not present a conflict for two reasons. First, the hazard that caused the longshoreman's injury during cargo unloading operations was not created by the longshoreman's employer; it was created during cargo loading by a foreign stevedore. Id. at 845. These facts are not within the scope of the Ninth Circuit's decision in petitioner's case, and the Ninth Circuit agrees that a duty to intervene may exist under such circumstances. Turner v. Japan Lines, Ltd., 651 F.2d 1300, 1305 (9th Cir. 1981), cert. denied, 459 U.S. 967 (1982). Second, the Fifth Circuit expressed serious doubts that Woods is even a duty to intervene case, so its pertinence is highly questionable. Woods v. Sammisa Company, Ltd., 873 F.2d at 852.

With specific regard to the Woods language that petitioner relies upon to suggest the Fifth Circuit imposes a virtually unlimited duty to intervene, that language pertains to cases in which an offloading longshoreman complains of a hazard created by an onloading stevedore that was not his employer. See also Lemon v. Bank Lines,

Ltd., 656 F.2d 110 (5th Cir. 1981). As the Ninth Circuit pointed out in this case, a different rule is warranted in such cases because the employer is not the best accident avoider since it is not the loader of the ship, because vessels can sue foreign stevedores for indemnification, and because injured longshoremen may have no practical remedies against foreign stevedores.[10] The dissent from the denial of certiorari in Sammiline upon which petitioner relies specifically referred to a conflict between the Fifth and Third Circuits on the question whether a vessel can be held liable "for injuries to a longshoreman unloading a vessel caused by the defective stowage of cargo by an independent stevedore." 493 U.S. 1050 (1990). The facts of petitioner's case present no opportunity to resolve any such conflict.

The Second Circuit is also not in conflict with the Ninth because it also has not decided the issue. Lieggi v. Maritime Company of The Philippines was not decided on the basis of a duty to intervene, but rather on the basis that the ship's mate was informed of the hazard,

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[10] Pet. A-12, A-13.

affirmatively undertook to correct the hazard, and failed to do so. 667 F.2d 324, 325-326, 328-329 (2d Cir. 1981).

Finally, the Fourth Circuit is also not in conflict. In Woodruff v. United States, the shipowner was held liable for failing to intervene to remedy a hazard presented by the structure of the ship itself, which exposed longshoremen to the risk of a fifty-foot drop onto the dock. 710 F.2d 128, 131 (4th Cir. 1983). The ship's crew had failed before turning the ship over to the stevedore to remove the hazard by rigging its own safety gear that was specifically designed to deal with the hazard, and also failed to intervene when it became apparent that the stevedore was itself doing nothing to remedy the hazard presented by the ship's structure. Id. Thus, the hazard was presented by the ship itself and was not created by the longshoreman's employer.

Petitioner has simply failed to demonstrate the necessary conflict among the circuits on the same matter addressed by the Ninth Circuit's decision. The decision complies with Scindia:

> [T]here are circumstances in which the shipowner has a duty to act where the danger to longshoremen arises from the

> malfunctioning of the ship's gear being used in the cargo operations . . . . It is quite possible . . . that [the stevedore's] judgment in this respect was so obviously improvident that [the shipowner], if it knew of the defect and that [the stevedore] was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch.

Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156, 175-176 (1981). In the present case, the Court of Appeals not only applied the rule as laid down, but analyzed the bases of its boundaries in consideration of the economics and practical safety considerations involved.

The decision in this case is also in accord with legislative intent that a vessel

> shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act, [citations omitted] . . . [or] for

> the manner or method in which stevedores or employees of stevedores subject to this Act perform their work.

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 4698, 4703.

The rational basis of the restriction of the duty to intervene to the ship and to ship's gear was explicitly recognized by the Fifth Circuit in Futo and again in Casaceli, where the court explained:

> A distinction between defects in the ship itself and its gear, and defects not directly related to the ship, is logical since the owner is primarily responsible for the ship, gains the most from its proper maintenance, and can usually best comprehend the danger from a defect in the ship, its gear or equipment.

774 F.2d at 1328.

Petitioner's effort to dismiss, by reference to Edmonds v. Compagnie Generale Transatlantique, the Ninth Circuit's concern that the stevedore not be insulated from economic safety incentives is not pertinent. 443 U.S. 256, 269-70 (1979). Edmonds addressed not the question whether a duty existed, but rather the asserted inequity that results under the LHWCA when a negligent shipowner must bear 100% of the longshoreman's damages even where a negligent stevedore has contributed to the injury. The shipowner had contended it was liable only for that share of the total damages equivalent to the ratio of its fault to the total fault. Id. at 258-259. The Ninth Circuit's concern in this case was that economic safety incentives remain on the stevedore to motivate the stevedore to prevent accidents ascribable to its own unsafe methods and not to any aspect of the ship.[11] Even if Edmonds were apposite, if it recognizes some inevitable inequity in the law's division of the burden of longshoremen's injury damages between vessel and stevedore employer, that does not constitute authority for the introduction of further inequity.

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[11] Pet. A-10, A-11.

Lastly, the notion that the decision below eliminates the intervention rule by leaving no remaining scope for its application is belied by Scindia itself, where the intervention rule laid down as to the ship's gear was the instrument of affirmance and remand for trial of the issue involved. The distinction between owner and charterers as to ownership of the gear is irrelevant to the basic standard of the intervention rule, and may only become relevant when the intervention rule is properly invoked and issues of fact are tried as to actual knowledge and responsibility for the condition and repair of the gear.

B. The Ninth Circuit Did Not Decide an Important Question About the Effect of Contract Provisions on the Vessel's Duty Under Section 905(b) of LHWCA.

The Ninth Circuit held certain provisions in charter agreements allocating cargo-related responsibilities among vessel interests do not create a duty to intervene for the safety of longshoremen.[12] Review of this decision is not warranted.

First, there is no indication that a question about the impact of charter party provisions arises often enough

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[12] Pet. A-15, A-16, A-17.

or troubles the courts sufficiently to make it serious, to say nothing about being sufficiently important to warrant review. Indeed, petitioner has not shown that the law on this issue is substantially unsettled. Petitioner points to Torres v. Johnson Lines, where a very different charter clause may have imposed a duty on a charterer to supervise the stevedore's operations and to have the ship's gear involved in the longshoreman's injury operated by "qualified men" from the vessel. 932 F.2d 748, 751 (9th Cir. 1991). The decision does not reflect that the issue whether the charter provision could have the effect of imposing on the "vessel" a duty of care for longshoreman safety was raised and explicitly resolved, either by the District Court or on appeal. Even if the law were somewhat unsettled within the Ninth Circuit, the en banc mechanism can address it.

The Circuit Court's decision in this case is in accord with Scindia, which recognized that contractual provisions between the stevedore and the shipowner could affect allocations of pertinent responsibilities between the stevedore and shipowner. 451 U.S. at 176 n.23. But the charter provisions in this case only run between owner and charterers, elements of the statutory "vessel," and do not

purport to transfer any functions or responsibilities between stevedore and "vessel." When a court reaches the obvious conclusion that the relative functions of the "vessel" and stevedore are unaffected by charter provisions between vessel interests, it does not raise a question calling for the intervention of this Court.

CONCLUSION

The Court should not grant the petition for writ of certiorari.

Respectfully submitted,

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